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IN THE

Supreme Court of the United States

No. 425 October Term, 1964

HERBERT C. ENGLE,

Petitioner

vs.

UNITED STATES OF AMERICA,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT, BRIEF IN SUPPORT OF PETITION, APPENDIX

and

MOTION TO DISPENSE WITH PRINTING OF RECORD

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

To the Honorable Earl Warren, Chief Justice of the United States, and Associate Justices of the Supreme Court of the United States:

Herbert C. Engle, Petitioner, respectfully prays that a writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in the above cause on May 19, 1964, affirming the judgment of the United States District Court for the Southern District of Ohio, Western Division dismissing petitioner's petition for a writ of habeas corpus.

1. The Record was not printed in the Court below and Motion is duly filed in this Court to dispense with the printing of the record on Petition for Certiorari. This Motion is printed as an addendum to this Petition and Brief.

OPINIONS BELOW

The Trial Court, the United States District Court for the Southern District of Ohio, Western Division, issued a memorandum opinion and order on June 13, 1963 in Case No. 5363. The decision has not been reported as yet. The United States Court of Appeals for the Sixth Circuit issued its decision affirming the trial court on May 19, 1964 in Case No. 15,544. This decision has not been reported yet.

JURISDICTION

This cause was argued before the United States Court of Appeals for the Sixth Circuit on April 17, 1964. The opinion and judgment of that Court were entered on May 19, 1964. On that date the Court of Appeals denied the petitioner's appeal and affirmed the trial court on the ground that the probationary sentence imposed on the petitioner was legal.

The jurisdiction of this Court is invoked under Section 1254, Title 28, United States Code.

The questions presented here were raised in the Trial Court, and in the Court of Appeals.

SUMMARY STATEMENT OF THE FACTS AND OF THE MATTERS INVOLVED

On June 5, 1959, the Petitioner-Appellant was indicted by the Federal Grand Jury of the United States District Court for the Southern District of Ohio, Western Division, on three indictments charging him with violations of Sections 152, 2314 and 1341 of Title 18 of the United States Code. The indictments were filed in cases numbered 9570, 9571 and 9572 in the aforementioned court.

Indictment No. 9570 contained four counts charging violations of Section 152, Title 18, U.S. Code. Indictment No. 9571 contained two counts charging violations of Section 2314, Title 18, U.S. Code, and Indictment No. 9572 contained one count charging a violation of Section 1341, Title 18, U.S. Code.

The Petitioner-Appellant pleaded not guilty to all three Indictments at his arraignment. Subsequently, on May 10, 1960, the Petitioner-Appellant withdrew his pleas of not guilty and entered pleas of guilty on all three Indictments, whereupon the cases were referred to the Probation Department for a pre-sentence report.

On May 12, 1960, the Petitioner-Appellant was sentenced by the Court to three years imprisonment on Case No. 9572, twelve years—probation and a fine of $5,000.00 on Case No. 9570; probation to commence at the expiration of the sentence on Case No. 9572, and ten years probation and a fine of $20,000.00 in Case No. 9571; probation to com-

mence at the expiration of the sentence in Case No. 9570.

Subsequently, the Petitioner-Appellant was committed to the Milan, Michigan Federal Reformatory to serve sentence on Case No. 9570.

On July 13, 1962, the Petitioner-Appellant was discharged from the Reformatory and is presently on probation in the City of Cincinnati, Ohio, serving the twenty-two ye .r probationary portion of his sentences on Cases 9570 and 9571.

QUESTIONS PRESENTED

1. Whether there is any power in the Federal Courts of first instance to sentence a defendant to a term of imprisonment followed by a probationary sentence in excess of the maximum period, permitted under the Federal Probation Act, Title 18, Section 3651 U.S.C. which provides that "The period of probation, together with any extension thereof, shall not exceed five years".

2. Is the Petitioner-Appellant now entitled to relief in habeas corpus from said probationary sentence?

REASONS FOR ALLOWANCE OF WRIT

The precise Federal questions of substance herein raised have not been heretofore determined by this Court. These are important questions of Federal law which should be settled by this Court. The questions go to the very essence of the administration of justice and the resolution thereof will vitally affect the administration of justice in criminal cases throughout the Nation.

PRAYER FOR WRIT OF CERTIORARI

Wherefore, your petitioner prays that a Writ of Certiorari issued under the seal of this Court directed to the United States Court of Appeals for the sixth circuit to the end that the constitutional questions and issues herein involved may be reviewed and determined by this Court as provided for by the Statutes of the United States; and that the judgment herein of said Circuit Court of Appeals be reversed by this Court and for such further relief as to this Court may seem necessary and proper.

Respectfully submitted,

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BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I. OPINIONS OF COURTS BELOW

The opinion of the Courts of Appeals for the 6th Judicial Circuit of Ohio has not been reported. A copy of the decision is appended hereto as Appendix G. The opinion of the District Court has not been reported. Copies of the memorandum opinions and orders of the District Court are appended hereto as Appendices D and F.

II. JURISDICTION

1. The date of the final judgment to be reviewed is May 19, 1964.

2. The statutory provisions which are invoked to sustain the jurisdiction of this Court are Section 2101 (e), Title 28, U.S. Code, and Section 2241, Title 18 of U.S. Code and the Acts of Congress relating to habeas corpus proceedings.

3. The petition is for review of a cause wherein final judgment has been rendered or passed upon by the highest Federal Court in which a decision could be had, in which petitioner specifically set up and claimed a right under the Constitution of the United States.

III. STATEMENT OF THE CASE

This has already been stated in the preceding petit
(pages 4 & 5), which is hereby adopted and made a p
of this Brief.

IV. SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals for the 6th Circuit erred:

1. In denying your petitioner's appeal and in holding that a probationary period of five years was imposed upon petitioner and that such sentence was legal.

2. In affirming the judgment of the U.S. District Court for the Southern District of Ohio, Western Division.

V. ARGUMENT

I

The Right of a Parolee to Bring Habeas Corpus.

On January 4, 1963, this Court decided the Case of *Jones v. Cunningham*, 9 L Ed 2d. 285, a Case in which the Petitioner, a parolee, filed a habeas corpus action against the Superintendent of the Virginia State Penitentiary alleging that his third-offender sentence was invalid because his federal constitutional right to counsel had been denied him at the trial on a larceny charge. The District Court dismissed the petition, but the Court of Appeals for the Fourth Circuit granted a certificate of probable cause and leave to appeal in forma pauperis. Shortly before the appeal, the Petitioner was paroled by the Virginia Parole Board and subsequently moved to add the members of the Parole Board as Respondents. The Court of Appeals refused to allow the addition on the ground that they did not have physical custody of the prisoner's person and therefore were not proper parties, and dismissed the Petition for habeas corpus, holding that the case was moot as to the prison superintendent because he no longer had custody or control of the prisoner. (294 F. 2d. 608)

On certiorari this Court reversed. In an opinion by Black, J., expressing the unanimous view of the Court, it was held that the cause against the Superintendent of the Virginia State Penitentiary was moot because his custody of the prisoner ended; (2) the prisoner, although

paroled, was in the "custody" of the members of the Virginia Parole Board, within the meaning of the federal habeas corpus statute, because the parole order imposed conditions which significantly confined the prisoner and restrained his freedom, and (3) the District Court did not lose jurisdiction of the Case by reason of the prisoner's leaving the district since the members of the Parole Board were within the Court's jurisdiction and could be requested to do all things necessary to bring the Case to a final adjudication.

The Court held that:

> "A release of a state prisoner into the custody of the parole places him in the "custody" of the members of the Parole Board within the meaning of 28 U.S.C., Section 2241 (c) (3)—which provides that the writ of habeas corpus shall not extend to a prisoner unless he is in custody—where the prisoner is confined by the parole order to a particular community, house and job at the sufferance of the Parole Officer, cannot drive a car without the permission, must periodically report to the Parole Officer, permit the Parole Officer to visit his home and job at any time, and follow the Parole Officer's advice, and can be rearrested at any time the Parole Board or the Parole Officer believes he has violated a term or condition of his parole."

The Court reversed and remanded this Case to the Court of Appeals with directions to grant Petitioner's motion to add the members of the Parole Board as Respondents and to proceed to a decision on the merits of Petitioner's Case.

II.

The Legality of Petitioner's Sentence.

In *U.S. Greenhaus*, 85 F. 2d. 116, the Court held that:

"Probation cannot be made conditional on serving a prior portion of a sentence."

In this Case the Defendant was convicted on fourteen counts of mail fraud and one conspiracy count. He received a sentence of twenty-one years in prison and five years probation; the probationary sentence to commence on the expiration of the prison sentence, which is precisely the situation we have in the instant case. The Court in the *Greenhaus* Case held at page 117 of the opinion that:

"We are satisfied however, that the suspension of sentence and accompanying probationary control were not lawful."

The Court in the *Greenhaus* Case went on to state that:

"It has been held that where sentence is suspended and probation follows, it cannot be made conditional on serving prior sentence. *White v. Burke*, (C.C.A), 43 F. 2d. 329; United States v. Praxulis, (D.C.) 49 F. 2d. 774, and Archer v. Snook, (D.C.) 10 F. 2d. 567. Doubtless the language of the Probation Act was capable of a broader construction as indeed Taft, C.J., intimated in his opinion in *United States v. Murray*, 275 U.S., 347, 358, 48 S. Ct. 146, 72 L. Ed. 309; but we think that the reasoning of that decision settled the law that probation cannot be made conditional upon serving a prior portion of a sentence both on

the grounds we have mentioned and also because such a mode of construing the act might subject defendants to conflicting disciplines by the Courts, the Executive and the Parole Board. More than that, it would result in confusion in determining the rates of commutation of sentence to be applied under the Commutation Act Section 1, U.S.C., Title 18."

In *United States v. Murray*, 72 L. Ed. 309, the defendant pleaded guilty to certain violations of the National Prohibition Act. He was sentenced to three months in jail, and was imprisoned in the jail. The day after sentence was passed, the District Court entered an order placing him on probation for two years, and the United States took the Case to the Circuit Court of Appeals by writ of error. From there, the Case was taken on certificate to this Court for opinion of questions arising upon writ of error to the District Court to review an order placing a convict on probation. As a companion Case to the Murray Case, the Court also considered the Case of *Cook v. United States*, in the same opinion, in the *Cook* Case, the defendant was convicted of twelve counts of mail fraud and was sentenced to fourteen years and nine months in prison and fined twelve thousand ($12,000.00) dollars. Three years later, Cook applied for and was granted probation by the District Court from which he had been sentenced. Objecting to this order, the United States sued out a writ of error to the District Court from the Circuit Court of Appeals. That Court held that:

"The Probation Act did not empower the District Court to grant probation to Cook, that the power conferred in the Act was not exercisable in a Case which had passed beyond the Court's control by the rendition

of a final judgment and the expiration of the term during which such judgment was rendered," 19 F. 2d. 826.

The question decided by the Supreme Court in both the *Murray* and the *Cook* Cases was:

> "WHETHER THERE IS ANY POWER IN THE FEDERAL COURTS OF FIRST INSTANCE, TO GRANT PROBATION UNDER THE PROBATION ACT, AFTER THE DEFENDANT HAS SERVED ANY PART OF HIS SENTENCE?"

In both Cases, the Court answered the question in the negative, holding as follows at page 313 of the opinion:

> "The words of the first section important on this issue are, "shall have powers, after conviction or after a plea of guilty or nolo contendre, * * * to suspend the imposition or execution of sentence, and to place the defendant upon probation is to follow the suspension of the imposition of sentence, without an interval of any part of the execution. That is a reasonable construction and serves the well-understood purpose of the statute. The suspension of the execution was the point in time to which the provisions for probation was directed. We do not say that the language is not broad enough to permit a possibly wider construction, but we think this not in accord with the intention of Congress."

In *U.S. v. Albrecht et al.* 25 F. 2d. 93, the defendants were convicted of a violation of the National Prohibition Act and sentenced to a year in jail and fined $3,500.00. After appealing the Case, both defendants were taken to jail to commence serving their sentences. After the affirmance by this Court, and before the mandate was filed in

the District Court, defendants in error orally petitioned the District Court to grant probation. The Court took the matter under advisement, and on March 5, 1927, at the adjournment of the September Term 1926, written petitions for probation, designated amended petitions, were filed, and on June 11, 1927, a hearing was had and an order entered placing both defendants on probation. The United States appealed from this order claiming that, because the defendants in error had commenced serving their sentences before an order of probation was entered, the Court was without power to place them on probation.

The Circuit Court reversed the District Court, basing its decision on the *Murray-Cook decision, supra*, and held in para. 1 of the syllabus that:

> "Order placing defendants on probation to be effective after they had served part of their sentence, held beyond Court's power. Order placing defendants on probation, made after defendants had commenced serving sentences, and requiring continuance of imprisonment for some period of time before order for probation should be effective, was beyond Court's power, even if Court had jurisdiction to make probation order, as contended, because motions for probation were made before commencement of sentences of imprisonment. District Court is without power to place prisoners on probation."

III

The Plain Import of the Statutes is That Probation Shall Be Continuous From Its Commencement to its Termination Without Intervening Suspensions and That the Courts Have no Inherent Power to Sentence to Probation Otherwise Than in Conformity Therewith.

Title 18, Section 3651 U.S. Code entitled "Suspension of Sentence and Probation:" provides in pertinent part as follows:

> "The period of probation together with any extension thereof, shall not exceed five years."
>
> "Probation may be limited to one or more counts, but, in the absence of express limitation, shall extend to the entire sentence and judgment."
>
> "Upon entering a judgment of conviction of any offense not punishable by death or life imprisonment, if the maximum punishment provided for such offense is more than six months, any Court having jurisdiction to try offenses against the United States, when satisfied that the ends of justice and the best interest of the public as well as the defendant will be served thereby, may impose a sentence in excess of six months and provide that the defendant be confined in a jail-type institution for a period not exceeding six months and that the execution of the remainder of the sentence be suspended and the defendant placed on probation for such period and upon such terms and conditions as the Court deems best."

In the present Case, the following penalties are prescribed for violations of the Sections of Title 18, U.S. Code involved:

Section 152—Shall be fined not more than $5,000.00 or imprisoned not more than five years, or both.

Section 2314—Shall be fined not more than $1,000.00 or imprisoned not more than five years, or both.

Section 1341—Shall be fined not more than $10,000.00 or imprisoned not more than ten years, or both.

Now, that a Court speaks only through its entries is a proposition that cannot be legally disputed by the Petitioner-Appellant, but for a factual construction of what the Court means, we must look to the entries of the Court.

APPENDIX C, the Judgment and Commitment in Case No. 9572, recites that the defendant be committed to the custody of the Attorney General for imprisonment for a period of three years. With this entry the Petitioner-Appellant has no dispute.

APPENDIX A, the Judgment and Commitment in Case No. 9570, recites that the defendant be placed on probation for a period of five years on Count 1 and for a period of three years on *each* (emphasis ours) of counts 2, 3 and 4, and it is with the language of this entry that the Petitioner-Appellant takes issue.

The precise meaning attached to the word "each" is individually or one by one (See Century Dictionary) and not collectively as referred to in the decision of the lower Court. For this Indictment the Petitioner-Appellant received a probationary sentence of fourteen years to commence at the expiration of the three-year prison sentence

on Case No. 9572 in addition to paying a fine of five thousand dollars.

APPENDIX B, the Judgment and Commitment in Case No. 9571, recites that the defendant pay a fine of $10,000.00 on each of Counts 1 and 2, *making a total fine of $20,000.00* (emphasis ours) and that he be placed on probation on *each* (emphasis ours) count for a period of five years; so that the Petitioner-Appellant received a probationary sentence of ten years to commence at the expiration of the sentence in Case No. 9572 in addition to a fine totaling $20,000.00 on counts 1 and 2 of the Indictment.

In order to resolve any possible doubt as to the length of the sentences imposed the Petitioner-Appellant looked to the transcript of the sentencing proceedings of May 12, 1960, (APPENDIX E) and found the following language at page 24 of the transcript of the sentencing proceedings:

> "There are no con-current sentences with reference to these counts or these Indictments."

Further, at page 23 of the sentencing proceedings, we find the following language:

> "That if you group all of these sentences on your probation, if it is violated, it would amount to serving a term of twenty-two years."

It may be noted that the maximum sentence of imprisonment for the offenses involved is forty years and not twenty-two years. Therefore the twenty-two years referred to by the Court in passing sentence applied to the probationary portion of the sentence which was actually imposed, which was clearly in violation of the express provisions of Section 3651, Title 18, U.S. Code.

IV

The Length of the Sentence Imposed.

In determining the length of the sentence imposed, the District Court applied the doctrine of presumptive concurrence in reaching the conclusion that the Petitioner-Appellant received a five-year probationary sentence, and cited the Case of *Gaddis v. United States*, 280 F. 2d. 334. It is the Petitioner-Appellant's position that the doctrine of presumptive concurrence has no application in the present Case, and if we are to indulge in presumptions it is quite the opposite presumption that attains to the present Case.

> "Where the record is silent as to whether two or more sentences of imprisonment or fines on the same individual are to be executed cumulatively, the presumption obtains that the sentencing Court intended the prisoner to serve the full aggregate of all imprisonments or pay the full aggregate amount of all fines, or that the same shall be covered by the credit allowance thereon, as provided in Section 13717 General Code. (*Williams v. State*, 8 Ohio St., 46, approved and followed). *Anderson v. Brown*, 117 Ohio St., 393."

In the absence of the express pronunciation of the Court as to whether the sentences imposed were to run consecutively or concurrently, it is the Petitioner-Appellant's position that the presumption that the sentences are to be served consecutively as enunciated in *Anderson v. Brown*, supra, should be applied, however, in the present Case we do not have a silent record, but one that sets forth the manner in which the probationary sentences were to be served, and that is consecutively.

In *Subias v. Hudspeth*, (10 Cir), 122 F. 2d 85 it was held that where an accused was tried and convicted on one indictment containing three counts and the trial court's judgment stated that accused was sentenced to seven years imprisonment on each of three counts and stated that "sentence not to run concurrently", the judgment was sufficient to impose total imprisonment for twenty-one years made up of three seven-year terms, one under the first count, one under the second and one under the third to be served consecutively and to follow each other in the same sequence as the counts appeared in the indictment notwithstanding the use of the word "sentence" in the singular instead of in the plural.

The court also held at page 87 that:

> "the opposite of concurrent is consecutive and cumulative. If the sentences are not concurrent they are consecutive and cumulative, and they are to be served in their numerical order. We think that there can be no doubt of the court's intention as reflected by the judgment and that it was the intention of the court to impose imprisonment for a term of seven years on each of the three counts in the indictment to run consecutively in their numerical order."

> "As a general rule, sentences are concurrent, in the absence of a definite expression therein that they should be consecutive."

> *Kirkman v. McClaughy*, 152 F. 255, aff'd 160 F. 438 (8 Cir.); *Zerbst v. Lyman*, 255 F. 609 (5 Cir.)

Where the court in sentencing stated that sentence was to commence "*when and as the sentence already imposed*

had been completed or terminated as provided by law", (italics ours) sentences were to run consecutively. *Gibson v. Looney*, 258 F. 2d. 879 (10 Cir.)

In the *Gibson v. Looney* case, *supra*, the court stated at page 880 that:

> "The language of the sentencing court is such as to make it clear that the sentences were to run consecutively. Criminal sentences cannot possibly eliminate every conceivable doubt as to their meaning. All that is necessary is that they disclose on their face a fair certainty of the intent of the trial court. United States v. Daugherty, 269 U.S. 360, 46 S. Ct. 156, 70 L. Ed. 309; Ong v. Hunter, 196 F. 2d. 256; Smith v. United States, 177 F. 2d. 434; Ziebart v. Hunter, 177 F. 2d. 847. We find no uncertainty in the meaning of these sentences and agree with the trial court that the sentencing court intended them to be served consecutively."

And, two or more sentences will be construed as cumulative or consecutive in character where their terms clearly indicate that such was the intention of the court.

In *Kay v. United States*, 279 F. 2d 734 decided (6) in 1960 it was held that:

> "Where defendant was sentenced under three indictments with the sentence on the second indictment to begin at the termination of service of concurrent terms imposed under first indictment and with sentence under third indictment to begin at termination of service of respective concurrent terms under second indictment, facts that sentences were entered on same day and defendant was committed for imprisonment

under each of three indictments on same day did not result in his serving sentences under each of the three indictments concurrently."

Again, in *Glenn v. United States*, 217 F. 2d 333, it was held that:

"Sentence of five years on each of two counts of indictment with three years of sentence on count two to run concurrently with the sentence on count one and the remaining two years of the sentence on count two to begin at the expiration and termination of the sentence on count one, revealed with certainty the intent of the court and constituted an effective cumulative sentence."

United States v. Remus, 12 F. 2d 239, held that:

"Concurrent service of sentences is not to be inferred from the absence of specific instructions to the contrary, if there are separate judgment entries and it is beyond the power of the court to require concurrent service."

Additionally, the following authorities represent the views of the respective circuit courts, all of which adhere to the holding that two or more sentences will be construed as cumulative or consecutive in character where their terms clearly indicate that such was the intention of the court:

Martin v. U.S., 285 F 2d 150 (10 Cir.); Smith v. Wilkins, 275 F 251 (5 Cir.); Young v. U.S., 274 F 2d 698 (8 Cir.), aff'd 81 S. Ct. 1670, 366 U.S. 761, 6 L. Ed 2d 853; Barker v. Looney, 261 F 2d 616 (10 Cir.); Dailey v. U.S., 259 F 2d 433 (7 Cir.); Ward v. Looney, 256 F 2d 180 (10 Cir.); Ward v. U.S., 256 F 2d 179

(10 Cir.); Valdez v. U.S., 249 F 2d 539 (5 Cir.); Hayman v. U.S., 241 F 2d 188 (9 Cir.); Seltenrich v. Sigler, 228 F 2d 615 (5 Cir.); Lipscomb v. Madigan, 224 F 2d 419 (9 Cir.); Mills v. Hunter, 204 F 2d 468 (10 Cir.); Ziebart v. Hunter, 177 F 2d 847 (10 Cir.); U.S. ex rel Laird v. O'Brien, 111 F 2d 232 (7 Cir.); McNeely v. Johnston, 100 F 2d 280 (9 Cir.); Van Gerden v. Johnston, 82 F 2d 729 (9 Cir.); Poffenbarger v. U.S., 20 F 2d 42 (8 Cir.); Phillips v. Biddle, 15 F 2d 40 (8 Cir.); Bailey v. U.S., 12 F 2d 706 (8 Cir.); Cronin v. Fox, 11 F 2d 139 (8 Cir.); followed in Cronin v. Totaro, 11 F 2d 140 and Cronin v. Godly, 11 F 2d 140 (8 Cir.); Fredericks v. Snook, 8 F 2d 966 (5 Cir.); Cole v. Sanford, 48 F Supp. 729 (D.C., N.D Ga.); Hogan v. Hill, 12 F Supp. 873 (D.C. MD. Pa.); Bracey v. Hill, 11 F Supp. 148 (D.C. MD. Pa.).

All of the foregoing authorities following the holding of cumulative or consecutive sentences where it is expressly provided in the judgments or sentences that they are to run "consecutively" as in *U.S. v. Daugherty*, 259 U.S. 360, 46 S. Ct. 156, 70 L Ed 309, or are to be "cumulatively" as in *Miller v. Sanford*, 161 F 2d 291, or where the cumulative character of the sentences appears from recitation of the total term to be served, as in *Pagne v. Madigan*, 274 F 2d 702, Affd 81 S. Ct. 1670, 366 U.S. 761 6 L Ed. 2d 853.

In the *Pagne* Case, *supra*, it was held that the written judgments and commitments signed by the judge on the same day as the oral pronouncements of the sentence confirmed the view that the sentences were to be served consecutively and the judgments and commitments could properly serve the function of resolving any ambiguity in the orally pronounced sentence.

In the instant case we have the language of the court that "there are no con-current sentences with reference to these counts or these indictments." In so doing the court referred to sentences, counts and indictments, all in the plural, and expressly stated that "*there were no con-current sentences*", (italics ours) again in the plural.

Considering this in view of the holding of the court in *Subas v. Hudspeth, supra*, we are led to the same conclusion as was reached in that case, that the sentences were consecutive sentences.

Considering the present case in light of the facts in the *Gibson v. Looney* case, *supra*, the court ordered that the probationary sentences were to commence "at the expiration and legal termination of the sentence imposed this day in a previous case," whereas in the *Gibson* case the court stated that the sentences were to commence "when and as the sentence already imposed had been completed or terminated by law."

It is respectfully submitted that the language used by the court in both of these cases is identical, and the identical conclusion should be reached by this court; the sentences were consecutive.

Considering the instant case in light of this court's decision in *Kay v. United States, supra*, it is again respectfully submitted that the probationary sentences were consecutive rather than concurrent as urged by the Respondent-Appellee.

And, if we are to apply the holding of this court in *Glenn v. United States, supra*, we are again inescapably led to the conclusion that the probationary sentences in question in the present case were consecutive rather than concurrent.

The only further question presented is whether the

sentence of the Court was merely erroneous, or whether it was illegal in the sense that it was void. It may be said that the modern doctrine or idea is that a Court must possess jurisdiction, not only of the person and the subject matter, but to impose the sentence which is adjudged. If the latter is lacking, the sentence is not merely voidable, but void. See *Black, Judgm.* Sec. 258, citing among others, *Ex Parte Lange*, 8 Wall. 163; *Ex Parte Milligan*, 114 U.S. 417, 5 Sup Ct. 935; *Ex Parte Kearney*, 55 Cal. 212; *In re Petty*, 22 Kans., 477, see also *Ex Parte Cox* (Idaho), 32 Pac. 197; *Ex Parte Yarbrough*, 110 U.S. 651, 4 Sup. Ct., 152.

In the instant Case, the Court had no jurisdiction to sentence the Petitioner-Appellant to serve a probationary sentence in excess of five years; hence, its attempt in that direction was void, and habeas corpus is the proper remedy.

CONCLUSION

In view of the foregoing authorities it is respectfully submitted that the probationary sentences in question are in excess of that authorized by Title 18, Section 3561 U.S.C. and therefore null and void.

It is therefore respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers in order that rights under the Constitution of the United States be preserved, and that to such an end a Writ of Certiorari should be granted, and this Court should review the judgment of the Court of Appeals and finally, reverse it.

Respectfully submitted,

ERNESTINE B. POWELL,
JOHN J. CONNORS, JR.,
FORREST L. BLANKENSHIP,
Attorneys for Petitioner.

APPENDIX OF PETITIONER

APPENDIX A—JUDGMENT & COMMITMENT

UNITED STATES DISTRICT COURT
FOR THE
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION
UNITED STATES OF AMERICA

v.

CHARLES WILSON TENANT, JR.
alias Herbert C. Engle

No. 9570

(Filed May 12, 1960)

On this twelfth day of May, 1960 came the attorney for the government and the defendant appeared in person and being represented by counsel.

IT IS ADJUDGED that the defendant has been convicted upon his plea of Guilty of the offense of knowingly and fraudulently concealing property in the estate of a bankrupt and knowingly and fraudulently making a false oath in a bankruptcy hearing in violation of Title 18, Section 152, U.S. Code as charged in the indictment and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of FIVE (5) YEARS on Count 1 and for a period of THREE (3) YEARS on each of Counts 2, 3 and 4 of the indictment.

IT IS FURTHER ADJUDGED that the defendant pay a Fine of Five Thousand ($5,000.00) DOLLARS on Count 1 of this Indictment and that he stand committed until the payment of said Fine or until he is otherwise discharged by law.

IT IS FURTHER ADJUDGED that sentence on each count of this cause commence at the expiration and legal termination of the sentence imposed this day in Criminal Cause 9572 of this Court.

IT IS FURTHER ADJUDGED that the sentences of imprisonment on Counts 1, 2, 3 and 4 in this cause be suspended and that defendant be placed on probation for said period of FIVE (5) YEARS on Count 1 and for a period of THREE (3) YEARS on each of Counts 2, 3 and 4.

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

/s/ CARL A. WEISMAN

APPENDIX B—JUDGMENT & COMMITMENT

UNITED STATES DISTRICT COURT
FOR THE
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION
UNITED STATES OF AMERICA

v.

CHARLES WILSON TENANT, JR.
alias Herbert C. Engle

No. 9571

(Filed May 12, 1960)

On this twelfth day of May, 1960 came the attorney for the government and the defendant appeared in person and being represented by counsel

IT IS ADJUDGED that the defendant has been convicted upon his plea of Guilty of the offense of transporting in interstate commerce certain securities knowing the same to have been stolen, converted and taken by fraud in violation of Title 18, Section 2314, U.S. Code as charged in the Indictment and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of THREE (3) YEARS on each of Counts 1 and 2 of the Indictment.

IT IS FURTHER ADJUDGED that defendant Pay a Fine of TEN THOUSAND ($10,000.00) DOLLARS on each of Counts 1 and 2 of this Indictment, making a total Fine of TWENTY THOUSAND ($20,000.00) DOLLARS in this Cause, and that defendant stand committed until the payment of said Fine or until he is otherwise discharged by law.

IT IS FURTHER ADJUDGED that sentence of imprisonment in this cause be suspended and that defendant be placed on probation on each count for said period of FIVE (5) Years.

IT IS FURTHER ADJUDGED that sentence of imprisonment in this cause begin at the expiration and legal termination of the sentence this day imposed in Criminal Cause 9572 of this Court.

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

/s/ CARL A. WEINMAN

APPENDIX C—JUDGMENT & COMMITMENT

UNITED STATES DISTRICT COURT
FOR THE
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION
UNITED STATES OF AMERICA

v.

CHARLES WILSON TENNANT, JR.
alias Herbert C. Engle.

No. 9572

(Filed May 12, 1960)

On this twelfth day of May, 1960 came the attorney for the government and the defendant appeared in person and being represented by counsel

IT IS ADJUDGED that the defendant has been convicted upon his plea of Guilty of the offense of using the mails to defraud in violation of Title 18 U.S.C., Section 1341, as charged in the Indictment and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of THREE (3) YEARS.

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

/s/ Carl A. Weinman

APPENDIX D—Filed June 13, 1963

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO

In the Matter of the Petition
of Herbert C. Engle for a writ
of Habeas Corpus

CIVIL ACTION NO. 5363

MEMORANDUM OPINION AND ORDER

It appears from the face of the petition and from the records of this Court, which are judicially noticed to the extent hereinafter indicated, that petitioner, pursuant to indictment and conviction under pleas of guilty, was sentenced by a judge of this court in three separate but related cases on May 12, 1960. Having served the committed portion of the sentence in the only one of the cases in which commitment was imposed, petitioner was discharged from confinement July 13th, 1962, and is presently serving the probationary sentence.

The first question presented is whether remedy under a writ of habeas corpus is available to the petitioner, and that issue is resolved affirmatively to the petitioner, whether restraint of liberty is total, as in solitary confinement, partial, as in the case of commitment to an honor camp, or minimal, as in the case of probation is only a matter of degree. The fact of restraint is present in each instance and the writ should be available to test the legality of the restraint. See *Jones v. Cunningham*, 371 U.S. 236 (1963).

Petitioner alleges that he is presently serving a 22-year probationary sentence and reaches this total period by tacking together periods of probationary sentences imposed under the various counts of the three indictments as though it had been provided that they run consecutively. However, no such provision for consecutive running is contained in the judgment of the Court, and in such circumstances it will be deemed that the periods will run concurrently. *Gaddis v. United States*, 280 F. 2d 334 (6th Cir. 1960). The sentence is within the limits permitted by law.

Petitioner contends that "probation cannot be made conditional on serving a prior portion of sentence," and cites two cases in support of that proposition. *United States v. Murray*, 275 U.S. 347 (1928); *United States v. Albrecht*, 25 F. 2d 93 (7th Cir. 1928). However, in these cases the probationary sentences were imposed after defendants had begun serving committed sentences, and thus are without application to the present situation. Petition further cites *United States v. Greenhaus*, 35 F. 2d 116 (2d Cir. 1936), but so far as here applicable the case is adequately disposed of by the more recent and, we feel, more well-reasoned decision of *Green v. United States*, 298 F. 2d 230 (9th Cir. 1960). See, *Affronti v. United States*, 350 U.S. 79 (1955), in which a sentence similar to the one here involved was at least inferentially approved.

In accordance with the foregoing, it is concluded that the sentences imposed upon and presently being served by the petitioner are not illegal, and therefore,

IT IS ORDERED that the petition for a writ of habeas corpus should be and it is hereby dismissed.

/s/ JOHN W. PECK
District Judge

APPENDIX E—TRANSCRIPT OF SENTENCING PROCEEDINGS

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO—WESTERN DIVISION

UNITED STATES OF AMERICA,
Plaintiff

v.

CHARLES WILSON TENNANT, JR.,
Defendant.

CASE NO. 9572

TRANSCRIPT OF PROCEEDINGS

BE IT REMEMBERED that on Tuesday, May 10, 1960, at 10:00 o'clock A.M., the above-styled action came on for hearing before the Honorable Carl A. Weinman, Judge of the United States District Court for the Southern District of Ohio, Western Division.

THE COURT: The cases that have been assigned beginning this morning will be taken up in the order in which they are listed. Counsel will be notified in sufficient time to be here depending upon the length of time that the first case, which I understand is for trial. You are ready to proceed in this case of the United States of America v Charles Wilson Tennant.

MR. STUEVE: Yes, for the Government may I say at this moment, the second case, McCracken case, the attor-

ney representing the defendant is here and several witnesses. As I understand, the Court will take up that matter later on this morning. In other words, I don't want to keep the Government officials here.

THE COURT: How many are here?

MR. STUEVE: Three from the Revenue here. Of course, it depends on what is going to happen in this case which I don't even know.

THE COURT: We shall discuss that very shortly.

MR. STUEVE: All right, sir.

THE COURT: Mr. Lester, are you ready to proceed?

MR. LESTER: I assume it is a mistake in the number of the case. We are not ready on 9570.

THE COURT: That is correct.

MR. LESTER: We are ready on 9572. Is that your understanding, Mr. Stueve?

THE COURT: That was the understanding at the conference that we had.

MR. LESTER: I assume the Clerk just numbered them in the order they were returned. That is 9572 then. If your Honor could pass this, oh, maybe for about fifteen minutes it might enable the Court to save a lot of time.

THE COURT: May I—

MR. LESTER: I would like to consult with Mr. Stueve.

THE COURT: Any of the oth r lawyers here in any of the other causes? Why don't we proceed with the other matters while these gentleman may use my office.

(WHEREUPON, this case was recessed for twenty minutes)

AFTER RECESS

THE COURT: Any matters for consideration of the Court?

MR. LESTER: Yes, if your Honor will call the numbered cases 9570, 71 and 72, I will then have a Motion. I think the disposition of all of them can be made. That is the reason I asked that they all be called.

THE COURT: By request of counsel representing the defendant the Court now is calling for determination 9570, 71 and 72.

MR. LESTER: With those cases called we ask leave in behalf of the defendant to withdraw the plea of not guilty as to each indictment and each of the several counts thereof and enter a plea of guilty to those.

THE COURT: Charles Wilson Tennant, Jr. alias Herbert C. Engle appear before the Court. You are Charles Wilson Tennant, Jr. alias Herbert C. Engle, the defendant in the three cases that have just been called?

MR. TENNANT: I am, sir.

THE COURT: You at a previous time before one of the other Judges of the Southern District of Ohio entered your plea of not guilty to each of three indictments returned against you.

MR. TENNANT: I did, sir.

THE COURT: Is it your desire at this time to withdraw your plea of not guilty to each of the indictments and to each count thereof and to enter your plea of guilty thereto?

MR. TENNANT: It is, sir.

THE COURT: I would like to hear statements on both sides before I proceed further with this case, and I would like to talk to counsel now to set a time for that if I may. Will you approach the Bench. (Discussion had off the record at the Bench.)

THE COURT: Mr. Tennant, in view of the fact that you have entered your plea the Court wishes to have a report from the Probation Department of this Court and I would like to have it before any and all matters pertaining to you before pronouncing sentence. I am requesting that be done as soon as possible so that there is not any further delay. *I will say to you, however, that you are entitled to credit in any sentence that I give you for the time that you have been serving or spending your time in the jail or any delay now pending this report you will be given credit.* If this matter can be determined by Thursday morning the Court may be ready by Thursday morning. If not the Court will come down the first open day and take care of this matter when the reports are ready. Anything further from counsel?

MR. STUEVE: Nothing.

MR. LESTER: Nothing now, but I assume you will hear from us after the reports come in.

THE COURT: If you can check this matter this afternoon it may be possible to complete it by Thursday morning. I assume that Mr. Tennant would like to do that but I want to be fair with him and have all the facts and consider it before I pronounce sentence.

MR. LESTER: I assume if it is Thursday morning it will be the same hour?

THE COURT: Let's try to do it by that time if we can and if the Probation Department can interview the defendant I wish you would do it so you get it in my hands at least late morning. That completes the proceedings this morning in these three cases?.

MR. STUEVE: Yes, sir.

THE COURT: Now, over here on the left there has been a lot of patient citizens of the United States waiting to find out what is going to happen this morning. You were subpoenaed here this morning particularly for the trial of this case. You see that although to you it has been a delay, as far as the time of the Court is concerned it has not been a delay. A guilty plea has been entered in this case. Is there any special time that these jurors are to return?

THE CLERK: We will send them a notice by mail or telegram when they are to appear.

THE COURT: Are they to report anywhere when I dismiss them?

THE CLERK: No, unless they wish to report to the Clerk's office to ask any questions.

THE COURT: Ladies and Gentlemen, you are excused as jurors today. You may go back to your homes and be subject to call by the Clerk of this Court in which anything develops that we may need you. You may be excused at this time.

(WHEREUPON, the jury was excused, and, the hearing was continued until Thursday, May 12, 1960.)

THURSDAY MAY 12, 1960

Court met pursuant to adjournment. Counsel being present as heretofore noted, the trial of this cause proceeded as follows:

THE COURT: We shall first dispose of the sentence in the criminal case involving Charles Wilson Tennant, Jr. and following that will be the arguments to be presented to the Court this morning in the case of the United States of America v Maurice McCracken. Counsel are present in the criminal case?

MR. STUEVE: The Government is ready, your Honor.

THE COURT: May I have your name for the record.

(James E. Appelgate)

THE COURT: Charles Wilson Tennant, Jr. will you approach the Bench with your counsel?

You have heretofore entered your plea of guilty to the case set for trial Tuesday of this week, being number 9572, using the mail to defraud, and thereafter entered your plea to the other two indictments that were pending against you, being numbers 9570 and 9571. Does the Government wish to make any statement?

MR. STUEVE: Yes. We have Special Agent Hanson from the FBI. He can very briefly go over the circumstances of the indictments, if the Court desires.

THE COURT: It is entirely up to counsel what you desire to do.

MR. STUEVE: Mr. Hanson will make a short statement.

MR. HANSON: Your Honor, Charles Wilson Tennant, Jr., during the time that he was the President of the King-Bee Leasing, Inc., caused to be made and falsifying, sent through the mail to people, based on the information contained in the financial statements, sold many, a number of automobiles, and thereafter failed to pay for these automobiles. Also, from the proceeds of sale of many of the automobiles received, he, in turn purchased $450,000.00 worth of United States Treasury Bonds and thereafter transported them from the State of Texas, where originally purchased, to Cincinnati, Ohio.

MR. STUEVE: What about the second count of that 9571 on the automobiles?

MR. HANSON: Then also after having purchased the automobiles from the dealer in Michigan on the basis of false financial statement, these automobiles were transported to Cincinnati, Ohio.

MR. STUEVE: How about 9572, the bankruptcy matter, four counts.

MR. HANSON: I am sorry, it is 9570. And thereafter he knowingly and fraudulently concealed property belonging to the bankrupt from the trustees and officers of the United States District Court as a receiver who was appointed December 8, 1959, in this bankruptcy matter, and that in turn he did purchase these United States Treasury Bonds in the amount of $450,000.00 and concealed them from this trustee.

MR. STUEVE: Count 2, 3 and 4.

THE COURT: They speak for themselves.

MR. STUEVE: We have nothing further.

THE COURT: Does counsel for the defendant wish to make a statement?

MR. LESTER: Yes. I listened intently to the agent from the FBI and I want to first call the Court's attention on one matter which is not to be construed in anyway in any attempt to withdraw or mitigate the offenses, but, if your Honor will notice in a response to a Motion for the Bill of Particulars in 9572 there appears a letter from Mr. Barber in Michigan that followed the forwarding to him of the statement which, in the event of a trial, would have been at issue here. Mr. Barber declined to extend credit upon the basis of that statement. I realize that possibly the offense was complete with the mailing of the statement; that no less of necessity would have had to be incurred by the person to whom it was sent to make the offense complete but I don't think it is any reliance placed on that statement by Mr. Barber. I rather think that the money that is owed to him may be by occasion of bankruptcy of this company. Other than that I think the statement is substantially correct that the agent made. I want to call your Honor's attention to this situation in regard to these several indictments. They were returned, I believe, over a year ago. Judge Druffel vacated the Bench on his own Motion which left the situation with Judge Underwood to assign another Judge in the District, if one were available. Judge Underwood appeared here in Cincinnati to accept the plea and entertain Motion by the defendant directed toward the indictment and in Chambers told Mr. Stueve and myself that he thought possibly he could not reach this case for trial, if he were required to try it, until probably 1958. I believe that was sometime in March or April of 1959. It appeared impossible to get another Judge at that

time. Of course, we know that Judge Martin, of the Sixth Circuit, frequently sits as a Judge, but there was vacancy. Judge Cecil had been nominated for that office and expressed the thought at that time that he didn't care to take on any trials in the District Court pending the confirmation by the Senate and it left the defendant in this situation where partly through no fault of his a trial was delayed for, well over a year. He did agree to the continuance and it was granted upon my Motion representing him, so it was partly owing to his situation and partly that of the Government that the trial was delayed. However, he has been incarcerated in the Hamilton County Jail for over a year, I think since April, 1959. Is that right, Mr. Tennant, April, 1959?

MR. TENNANT: That is right.

MR. LESTER: His incarceration commenced, Your Honor with the bankruptcy hearing, testimony being referred to the Grand Jury by Judge Druffel and the defendant committed in default of a $25,000 bond which he could not give. Later the bond was increased after the indictments — and we make no complaint about that — except to bring out the statement that he was unable to be enlarged upon bail because of that bond. I don't think, your Honor, and I assume you now have before you the report of the Probation Officers, there is anything vicious about this defendant. I have been in close touch with him over a year and I think it might merit your consideration for some credit for the time that he has been in jail and, secondly, your Honor, that it might merit probation, possibly with a longer period of probation. I think that it would serve no further purpose to incarcerate him beyond the period that he has already been in jail. He has handed me a

statement that he prepared himself, a part of which I told him I would read to the Court: "I pray that the Court I stand before will receive this humble resume. I prepared it in hopes that it might shed some light on the charge that I am before this Court on that resulted from the involuntary bankruptcy of a corporation that I own.

I came to Cincinnati in February of 1947. I was employed at Avco Manufacturing Company. It was there I met my wife, married on August 15, 1947. We have been blessed with one child, a daughter now six years of age.

I am sure that the Court has my full resume before him. I resigned from Avco late October, 1948, and entered the automobile business. I was doing business as King-Bee Leasing, Inc. I had weathered all of the economic ups and downs through '57 and continued to prosper. It was in '57 that I expanded the subject company in the franchise of business and servicing. I presented my franchise program to many automobile dealers that I done business with over the past several years. Several participated, some to a larger extent than others. Their participation began in '58. It is a known fact that many businesses suffered an economical recession in '58. However, there were only three of the dealer-creditors when the voluntary bankruptcy was brought against me. It has been reported that the liability of the bankruptcy are approximately $1,200,000. I cannot accept this figure without an audit. However, accepting it as correct, the subject corporation still owns two tracts of property" . . . And detailed in some statements concerning that bankruptcy matter that probably are not particularly appropriate here. But I do think his difficulties in this instance arose out of his efforts to salvage this company that he probably saw going under.

It really stems from a civil matter other than any imbedded idea of indulging in criminality. True, he had a record going back some twenty years, but as far as I know, and, at least so far as the record of the Department of Justice, there has been no convictions other than that one that is nearly twenty years ago in Carolina. So, with that I submit to your Honor that I think the case does at least call for some leniency, although the charge is serious.

THE COURT: Stand up, Mr. Tennant, please.

Charles Wilson Tennant, Jr., do you have anything to say to the Court before the judgment of the law is pronounced against you.

MR. TENNANT: I do not.

THE COURT: This Court was requested by the Chief Justice of the Southern District of Ohio to take care of this case sometime in February of this year. Immediately thereafter there was a hearing in Judge Druffel's court room, in which I was presiding, at which time we attempted to set a date for trial, I believe, for a part of April. It was then discovered that the Circuit Court of Appeals was using the facilities of this courtroom and therefore necessary to place the case for trial during the month of May and it was assigned for trial on 9572, which we call the mail fraud case, for Tuesday of this week. I have had before me the report of the Probation Department, a report of the statements that you have made to the agents of the Probation Department since your appearance here last Tuesday. Most of it was included in the report or the letter that your counsel just read. It is true that under the report of the Federal Bureau of Investigation and the period that you served time was back in the year 1924, and

I may read so that you know what it was about. "You and a man by the name of Brady opened a filling station in a small village named Peeks, No. Carolina; that you bought on assignment $300. of automobile tires from the Firestone Rubber Company? Later that year the representative of the Firestone Company, when visiting your station, noticed the tires not present and an invoice revealed they had been sold but the money not turned over to them. The Company, therefore, filed a warrant against you; you stood trial and the jury found you guilty of imbezzlement and sentenced you to the No. Carolina prison. As far as the other records are concerned there never was any trials, there has never been any sentence imposed: There was information of various complaints but they were not processed." The report further shows that you did start in business in '48; continued in business and that at least from '48 up until the time that the bankruptcy was filed there were no criminal action, at least on my record, that we filed against you. Although there is a lot of information as to what we might term as "shady deals" that may have been entered into but again in most of these instances your company was dealing with other automobile agencies throughout the country. My investigation disclosed that you really didn't get into definite trouble until the bankruptcy hearing. You were failing to cooperate with the Referee in Bankruptcy with investigation as to the assets of your company, the King Bee Leasing Company, and after all, that particular company had a considerable number of creditors, your creditors, and it was upon the strength of your refusal to cooperate that Judge Dimmick placed you in contempt of court in April of '59 and you were in the jail under that order under the $25,000 bond, and, then in June indict-

ments that we are here this morning to consider, were made against you and the bond was continued. Naturally, in considering the disposition of your case the Court is taking into consideration the time that you have been in the County jail. The delay has not been entirely your fault. The Court is also taking into consideration the fact that you have entered a plea first to the mail fraud case. When you did not cooperate, naturally, the Government was trying to find as many complaints that could be filed against you as possible, because if they couldn't hold you on one complaint they might hold you on one of the other complaints. That is legal procedure. So, the suggestion that you dispose of all of these counts was made on Tuesday, even though some of them were personal accounts so far as this Court is concerned, the record is clear and the case terminates all of them filed against you. Your attorney will probably have to explain some of the ramifications of the sentence that I am going to impose. Taking into consideration all of these matters, your request of the time that you have spent, will be detailed by the Court so there is a record of it in the hands of not only the Attorney General, but the Parole Board of the United States. The Court, therefore, taking into consideration your plea, the reports that have been filed with the Court, the type of crime that is involved in this case, and the fact that it all arises from your defunct corporation, but more particularly because of your failure to answer questions that the Court Referee, creditors and the lawyers felt that you should answer. The Court, therefore, feels that it has three purposes here in sentencing you this morning. One is the punishment for your act or acts. Second, as to find a way to put you under strict surveillance in the Probation De-

partment of the United States and, third, is to place over your head such a type of commitment that you will never violate any laws of the United States or any acts which will cancel any of the provisions of probation that the Court may give under certain circumstances. The Court is doing this because it does not know whether you spent the money or whether you have the money or whether you know where the money may be. But if it is found, wherever it is found, in the years to come it is my duty to place you under such surveillance so that the Government rightfully can take the money and place it in the hands of the creditors. Maybe you did lose it, I don't know. That is not for me to decide. All I know is that there was no cooperation and that you have entered your plea of guilty. Taking all of these matters into consideration it is the judgment of this Court under the case assigned for trial for Tuesday, being 9572, the mail fraud case, that you be placed in the custody of the Attorney General of the United States for a period of three years. Under indictment 9570 there are four counts. The one is the concealing of the property belonging to the estate and, by the way so that you may know the maximum sentence that can be placed on 9572, the law 18 USC 1814 provides a penalty of $1,000.00 fine and up to five years in prison. And under the indictment 9570 with four counts, the violation is set forth in Title 18 USC Section 152, a penalty of $5,000.00 and not more than five years imprisonment.

You were given your opportunity if you had any statement to make with reference to any of these indictments and you said no. It is, therefore, the judgment of this Court under the first count of indictment 9570 that you pay a fine of $5,000.00 and you stand committed until said fine

is paid. And further that you be given into the custody of the Attorney General of the United States for a period of five years. The execution of the five year term is suspended and you are placed on probation for a period of three years. Such period of probation following your release from confinement as provided for under the sentence imposed under 9572.

As to Count 2, 3 and 4, which are perjury counts under the same indictment, 9570, it is the judgment of this Court that you be given into the custody of the Attorney General of the United States for a period of three years and said sentence is suspended and you are placed on probation for a period of three years beginning on your release from confinement, your legal release from confinement, as provided in 9572. And this sentence shall apply to each of the three counts, 2, 3 and 4 of that indictment.

Further, indictment 9571, in which there are two counts, in this case there shall be identical sentences in each count. This is the one where there was some evidence that you may have transported interstate commerce and the bond of that at least have not been found. In each of these counts, therefore, the Court sentences you to pay a fine of $10,000.00 and stand committed until such fine is paid. In each of these counts you will be in the custody of the Attorney General for a period of three years. The execution of said sentence is suspended and you are placed on probation for a period of five years on each of these counts commencing upon the legal conclusion of your sentence provided in 9570.

Perhaps as a recap, and these matters can be explained to you by your counsel, the total fines on this amount to $25,000.00, incarceration amounts to three years with a

letter from the Court to the Parole Board with reference to the time that you have been in the jail.

You will not that sentences have been suspended which means that you will be under supervision of the Parole Board of the United States Parole Office from anywhere of three to five years after you are through with your sentence.

The Court cannot say that you have been guilty of the many other matters that are reported. The Court is telling you now that if you violate any of the provisions of the probation this sentence has so been made and this Court will exercise its rights if the occasion ever requires the same to be done. That if you group all of these sentences on your probation, if it is violated, it would amount to serving a term of twenty-two years. Your actions, yourself, will determine whether or not any of that provision is done. There are no con-current sentences with reference to these counts or these indictments. You are now in the hands of the Attorney General.

MR. LESTER: Your Honor, I notice that you said at the conclusion of his sentence, under 9570—did you not mean 9572?

THE COURT: 9572 should be correct. It is only the one that it has reference to. His confinement and the probation starts at the conclusion of that.

MR. LESTER: It was the last time that Your Honor said that.

THE COURT: Thank you for calling it to my attention.

(WHEREUPON, this hearing was completed.)

CERTIFICATE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

This is to certify that the foregoing transcript of proceedings in the matter of

UNITED STATES OF AMERICA,
Plaintiff

v.

CHARLES WILSON TENNANT, JR.,
Defendant

Case No. 9572

on the 10th and 12th of May, 1960, before the Honorable Carl A. Weinman, Judge of the United States District Court for the Southern District of Ohio, Western Division, is a true and correct transcript thereof.

/s/ CAROL R. TOWLE,
Official Court Reporter.

October 2, 1960

APPENDIX F

Filed June 25, 1963

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

In the Matter of the Petition of Herbert C. Engle for a Writ of Habeas Corpus

CIVIL ACTION NO. 5363

MEMORANDUM OPINION AND ORDER

Under the date of June 13th, 1963, we dismissed petitioner's petition for a writ of habeas corpus on the ground that the sentence imposed upon him in proper proceedings before this court was legal. There is now before us a motion requesting that we "alter and/or amend" the order dismissing the petition for the reason that it "is based upon a mistake."

Petitioner has served the committed portion of the sentence imposed without complaint as to its legality, and the crux of the question presented by the present motion, which has been submitted with a supporting memorandum and waiver of oral argument, is whether the probationary sentence imposed is in excess of the 5-year maximum provided by Title 18 United States Code, Section 3651. Petitioner's memorandum cites portions of the transcribed record of the proceedings in which sentence was imposed in support of his argument that the probationary periods were to run consecutively and thus in excess of five years, but it is axiomatic that a court speaks only through its

entries. *Dudley v. United States*, 242 F. 2d 656, 658 (5th Cir. 1957); *Schmidt v. Esquire, Inc.*, 210 F. 2d 908 (7th Cir. 1954); see also *Will v. McCoy*, 135 Ohio St. 241, 242 (1939).

The entry in the present situation is silent as to whether the probationary periods were to run concurrently or consecutively, and in such circumstances the presumption is that they shall run concurrently. See authorities cited in Memorandum Opinion filed herein June 13th, 1963. Further an additional rule of construction requires that where alternative interpretations of an ambiguous order are possible, that will be adopted which can be given legal effect. *See Hendrie v. Lowmaster*, 152 F. 2d 83, 85 (6th Cir. 1945); *Burton v. Equitable Life Assur. Soc. of the U.S.*, 21 F. Supp. 62 (W.D. Okla. 1937); *Pen-Ken Gas & Oil Corporation v. Warfield Natural Gas Co.*, 137 F. 2d 871, 879 (6th Cir. 1943).

In accordance with the foregoing, it is our conclusion that a probationary sentence of a period of five years was imposed upon petitioner, that such sentence is legal, and therefore

IT IS ORDERED that petitioner's motion to alter and/or amend the order dismissing petitioner's petition for a writ of habeas corpus should be and it is hereby overruled.

/s/ JOHN W. PECK
District Judge.

APPENDIX G

Filed May 19, 1964

No. 15544

UNITED STATES COURT OF APPEALS
For The Sixth Circuit

HERBERT C. ENGLE,
Petitioner-Appellant,

v.

UNITED STATES OF AMERICA,
Respondent-Appellee.

Appeal from Order of United States District Court for the Southern District of Ohio, Western Division, Dismissing Petition for Writ of Habeas Corpus.

Decided May 19, 1964.

Before: O'SULLIVAN, PHILLIPS and EDWARDS, Circuit Judges.

EDWARDS, Circuit Judge. Petitioner-Appellant in this proceeding sought a writ of habeas corpus to free himself from sentence of probation which had been imposed on him by United States District Judge Carl A. Weinman. He had, prior to filing his petition, served a three year sentence for mail fraud imposed by Judge Weinman at the same time as the probation sentences. The sentencing judge specified that the probation sentences were to begin after completion of the term of commitment.

Federal District Judge John W. Peck, who heard the habeas corpus petition, held on what we regard as settled authority that a probation sentence could be attacked by habeas corpus (see *Jones v. Cunningham*, 371 U. S. 236 (1963)) and that the sentencing court had power to make the probation terms commence after completion of the sentence of commitment, *Frad v. Kelly*, 302 U.S. 312 (1937); *Green v. United States*, 298 F. 2d 230 (C.A. 9 1961).

On this appeal the only material question pertains to petitioner's contention that the probation sentences imposed by Judge Weinman were consecutive rather than concurrent, and that in total they greatly exceeded the five year limitation on probation contained in Title 18, U.S.C. §3651.

The applicable statutory language reads: "The period of probation, together with any extension thereof, shall not exceed five years." Title 18, U.S.C. §3651.

The two judgments of the court complained of in this regard, as signed and entered by Judge Weinman, read in pertinent part as follows:

> Criminal No. 9570:
>
> "IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of FIVE (5) Years on Count 1 and for a period of THREE (3) Years on each of Counts 2, 3, and 4 of the Indictment.
>
> "IT IS FURTHER ADJUDGED that defendant pay a Fine of FIVE THOUSAND ($5,000.00) DOLLARS on Count 1 of this Indictment and that he

stand committed until the payment of said Fine or until he is otherwise discharged by law.

"IT IS FURTHER ADJUDGED that sentence on each count of this cause commence at the expiration and legal termination of the sentence imposed this day in Criminal Cause 9572 of this Court.

"IT IS FURTHER ADJUDGED that the sentences of imprisonment on Counts 1, 2, 3 and 4 in this cause be suspended and that defendant be placed on probation for said period of FIVE (5) YEARS on Count 1 and for a period of THREE (3) YEARS on each of Counts 2, 3 and 4."

Criminal No. 9571:

"IT IS ADJUSTED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of THREE (3) YEARS on each of Counts 1 and 2 of the Indictment.

"IT IS FURTHER ADJUDGED that defendant Pay a Fine of TEN THOUSAND ($10,000.00) DOLLARS on each of Counts 1 and 2 of this Indictment, making a total Fine of TWENTY THOUSAND ($20,000.00) DOLLARS in this Cause, and that defendant stand committed until the payment of said Fine or until he is otherwise discharged by law.

"IT IS FURTHER ADJUDGED that sentence of imprisonment in this cause be suspended and that defendant be placed on probation on each count for said period of Five (5) Years.

"IT IS FURTHER ADJUDGED that sentence of imprisonment in this cause begin at the expiration and legal termination of the sentence this day imposed in Criminal Cause 9572 of this Court."

Thus the judgments of probation were plainly consecutive to the sentence of commitment in Criminal Cause 9572. But they were silent as to whether each separate probation term was to run concurrently or consecutively.

The sentencing judge described the result of the sentences to the prisoner in open court as follows:

"Perhaps as a recap, and these matters can be explained to you by your counsel, the total fines on this amount to $25,000.00, incarceration amounts to three years with a letter from the Court to the Parole Board with reference to the time that you have been in the jail.

"You will note that sentences have been suspended which means that you will be under supervision of the Parole Board[1] of the United States Parole Office from anywhere of three to five years after you are through with your sentence."

Nonetheless, petitioner asserts that the sentencing judge used other language which had the effect of making the probation sentences consecutive totaling twenty-two years, which thereby violated Title 18, U.S.C. § 3651, and thus made them void.

The language relied on followed that just quoted:

"The Court is telling you now if you violate

[1] This reference to the Parole Board is in error. Supervision of the probation sentences would be under the Probation Department of the Federal District Court.

> any of the provisions of the probation this sentence has so been made and this Court will exercise its rights if the occasion ever requires the same to be done. That if you group all of these sentences on your probation, if it is violated, it would amount to serving a term of twenty-two years.[*] Your actions, yourself, will determine whether or not any of that provision is done. There are no con-current sentences with reference to these counts or these indictments."

In this entire paragraph Judge Weinman was not talking about the probation sentences. He was plainly talking about what the situations might be if probation were violated. We cannot read into these words an intention to make the probation sentences nonconcurrent and extending for twenty-two years as petitioner contends we should.

We believe the District Judge who heard this habeas corpus petition was correct in holding that the entries of sentence were silent as to whether the probationary periods were to run concurrently or consecutively; that in the situation before him the presumption should apply that they run concurrently, *Gaddis v. United States*, 280 F.2d 334 (C.A. 6 1960); see also *Mills* v. *Hunter*, 204 F.2d 468 (C.A. 10 1953); *Hode v. Sanford*, 101 F.2d 290 (C.A. 5 1939), and that a probationary sentence of a period of five years was imposed upon petitioner, and "that such sentence is legal."

Affirmed.

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[*] Our arithmetic indicates that the commitment sentences which were suspended totaled twenty years.

MOTION TO DISPENSE WITH PRINTING OF THE RECORD ON PETITION FOR WRIT OF CERTIORARI TO THE U.S. COURT OF APPEALS FOR THE SIXTH CIRCUIT.

To the Honorable Earl Warren, Chief Justice, And to the Associate Justices of the Supreme Court of the United States:

Now comes the petitioner, Herbert C. Engle, by his attorneys, and respectfully moves your Honorable Court to permit the petitioner to proceed with his petition for writ of certiorari seeking a review of the judgment of the Court below, the U. S. Court of Appeals for the Sixth Circuit, without being required to print the record in the said cause.

In support of said Motion your petitioner avers:

The record was not printed in the Court of Appeals for the reason that the petition filed in the District Court was denied on the basis of the pleadings and the attached exhibits, and no evidenciary hearing was had in the case prior to the dismissal of the petition in the Memorandum Opinions and Orders filed by the District Court.

Accordingly, in order that the consideration of the petition for writ of certiorari, to be herewith filed, may be had during the present term of your Honorable Court, the petitioner files his motion seeking leave to proceed on the transcript prepared by the Clerk of the Court of Appeals and the copies of the original exhibits included in the appendix.

Therefore the premises having been duly considered, it is respectfully prayed that leave be granted the petitioner to file a petition for writ of certiorari on the typewritten transcript and the original exhibits as embodied in the original record certified to this Honorable Court by the Clerk of the Court of Appeals for the Sixth Circuit.

Respectfully submitted,

ERNESTINE B. POWELL,
JOHN J. CONNORS JR.,
FORREST L. BLANKENSHIP,
Attorneys for Petitioner.

In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 425

HERBERT C. ENGLE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

We respectfully invite the attention of the court to the following facts which show that the petition was filed out of time:

On May 19, 1964, the Court of Appeals for the Sixth Circuit affirmed the district court's decision dismissing petitioner's petition for writ of habeas corpus (Pet. 1, 3, 10, Appendix G). The petition for a writ of certiorari was filed ninety-seven days thereafter, on August 24, 1964.

Section 2101(*c*) of Title 28 provides that "any writ of certiorari intended to bring any judgment or decree in a civil action, * * * before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree."

743-616—64

Since these limits are jurisdictional, the petition should be dismissed as untimely.

Respectfully submitted.

ARCHIBALD COX,
Solicitor General.

SEPTEMBER 1964.

U.S. GOVERNMENT PRINTING OFFICE 1964